the Oxford position. Carter interviewed in Pine Bluff for the Complex HR Manager position with the understanding that she had already been offered the same position in the Oxford Complex. Carter was offered and decided to accept the Pine Bluff position. Upon learning of Carter's decision to accept the Pine Bluff position, Pittard's second choice for the Oxford Complex HR Manager was Burdick.

Petitioner filed a general complaint with Tyson (with no reference regarding discrimination) about the decision to promote Burdick. Petitioner met with Schaeffer to discuss her complaint and told Schaeffer that she was highly upset over the decision. Later, Pittard and Schaeffer together met with petitioner to discuss the promotion decision. Pittard shared with petitioner the categories in which he ranked the four candidates and how each candidate fared in each category. Pittard further informed petitioner that he based his decision on the rankings, his knowledge of the candidates and references. He also reviewed the rankings with petitioner. When the meeting was over, petitioner told Pittard that she still disagreed with the decision and asked him who was the next person in management to whom she should take her complaint; he referred her to Dan Serrano, Assistant Vice President, Food Service HR Operations. Petitioner spoke with Serrano about her concerns over the awarding of the position to Burdick.

Following her discussion with Serrano, petitioner e-mailed Cathy Clark (African-American female and EEO/AA Director) and stated that, although she had spoken with Serrano and several others, she was still unconvinced that the promotion was fair. She requested that Clark look into the matter further.

After receiving petitioner's complaint, Clark notified Michelle Eisner, Senior Vice President, Human Resources, and told her she (Clark) would investigate. Clark requested that petitioner complete a set of questions regarding her

complaint. Petitioner complied and submitted her responses prior to meeting with Clark, as requested. During the course of her investigation, Clark interviewed petitioner, Hithon, Pittard and Trotter. In addition to the interviews, Clark also reviewed the personnel files and resumes of the three remaining candidates (petitioner, Hithon and Burdick).

After Clark reported the substance of the interviews to Eisner, Eisner instructed her to coordinate a panel review of the promotion decision. Eisner further instructed her to get a diverse group to participate on the panel and to engage an outside firm to assist in the review process. In determining the make-up of the panel, Clark looked at corporate human resources directors and selected a diverse group of candidates. She selected an African-American male, Leonard Parks, and Peggy Roles, a white female, both of whom were divisional HR Managers. She also selected David Mantooth, VP of Operations (Native American male) and Eugene Eggman, another divisional HR Manager (white male). In preparation for the review, Clark provided the panelists with the names of the candidates and a description of the Complex HR Manager position. Fortune Personnel Consulting, a firm based out of Huntsville, Alabama, was engaged by Tyson to facilitate the review process. David Harris, President of Fortune, was personally responsible for overseeing the review.

Clark notified petitioner that she would have a second interview (as a part of the review) for the Oxford position. Clark further explained that an interview process called Topgrading (developed by Harris) was going to be utilized and that the questions were designed to elicit the candidates' assessments of their own competencies in the following areas: intellectual, personal, interpersonal, management, leadership, and motivational. Clark also notified petitioner of the names of the panelists and told her that the entire interview process

should take three and a half hours. Lola Hithon and Lisa Burdick also interviewed as a part of the panel's review.

Prior to the interviews, the panelists met with Harris, the facilitator of the interviews, and he discussed with them the interview process and the questions that would be asked of each candidate. Each panelist was also given a copy of the candidates' resumes to review before their interviews. In addition, before the interviews began, Harris informed the panel that it was the panel's charge to make the best selection for the position and that whomever the panel selected would be placed in the position. The individual candidates were not discussed among the panel members prior to the interviews. Harris explained to petitioner at the beginning of her interview that he would ask the questions and that the panelists would take notes as she responded. During the interviews, each candidate was asked the same questions. Harris asked the majority of the questions and occasionally one of the panelists would ask a follow-up question for clarification or elaboration. At the end of each candidate's interview, Harris led a discussion where the panel reviewed their opinions of the candidate's strengths and weaknesses.

After the interviews, each panelist ranked the candidates in the following manner:

Mantooth	Roles	Eggman	Parks
1. Burdick	1. Burdick	1. Burdick	1. Petitioner
2. Petitioner	2. Petitioner	2. Petitioner	2. Burdick
3. Hithon	3. Hithon	3. Hithon	3. Hithon

After the interviews were completed, the panelists formulated a summary of the candidates' strengths and weaknesses based on the interviews. The panel ultimately recommended that Burdick was "the candidate who best fits the Oxford Complex HRM position." Pet. Appx. 35a. While Parks believed that petitioner should have been the successful can-

didate because of her seniority, he believed that petitioner and Burdick were equally qualified.

REASONS FOR DENYING THE WRIT

There is no split in the circuits on the question posed in the petition. Nor is there any other reason to review the lower court's fact-bound determinations, which are based on settled legal principles and are set forth in a terse, unpublished and non-precedential opinion. Accordingly, the petition should be denied.

I. ALL CIRCUITS APPLY THE SAME BASIC STANDARD TO PRETEXT CLAIMS BASED ON COMPARISONS OF QUALIFICATIONS.

Following the guidance of this Court, the courts of appeals uniformly recognize that a Title VII plaintiff who seeks to establish pretext based solely on evidence of comparative qualifications must show that his or her qualifications were *markedly* superior to those of the candidate selected for a job or promotion. Although the lower courts have used different phrases to capture this concept, there is no meaningful difference between their various verbal formulations. Petitioner's citation to a welter of (mostly unpublished) decisions does not establish either that the different phrases are "outcome determinative," or that the Eleventh Circuit's "slap in the face" formulation is, like strict scrutiny under the Equal Protection Clause, "fatal in fact." Indeed, the Eleventh Circuit's application of its "slap in the face" standard confirms that it is substantively indistinguishable from the standards used by other courts of appeals. In all events, even if there were any substantive difference, this case is an inappropriate vehicle for addressing the issue, because petitioner did not in fact claim that she was more qualified under the criteria that were actually used in this case. Instead, she claims she was more qualified under the standards that she believes *should*

have been used, which is not a superior qualifications claim. Further, an independent committee reviewed the promotion decision at issue in this matter and reached the same conclusion, and there is no evidence that the committee's decision was tainted by age or race discrimination.

1. All of the courts of appeals that have addressed the question have concluded that a factfinder cannot base a finding of pretext solely on evidence of comparative qualifications unless the plaintiff establishes that his or her qualifications were markedly superior to those of the candidate chosen. This requirement is compelled by this Court's recognition that Title VII "was not intended to diminish traditional management prerogatives," *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981). Accordingly, "[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not itself expose him to Title VII liability, although this may be probative of . . . pretext." *Id.* (internal quotation marks and citations omitted). See also *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 243 (1989) ("the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color") (internal quotation marks and citations omitted).

In compliance with these instructions, the courts of appeal have sought to ensure that courts and juries do not act as "super personnel departments" that "second guess" good faith business judgments. Because it is in the employer's own interest to select the most qualified applicant, an employer's judgment about qualifications is assumed to be made in good faith.

As the First Circuit has explained:

> in the absence of strong objective evidence (e.g., test scores), proof of competing qualifications will seldom, in and of itself, be sufficient to create a triable issue of pretext. . . . This result follows from a form of the business judgment rule. . . . Qualifications are notor-

> iously hard to judge and, in a disparate treatment case, more must be shown than that the employer made an unwise personnel decision by promoting "X" ahead of "Y." . . . In other words, subjective evidence of competing qualifications seldom provides a principled way for a factfinder to determine whether a given employment decision, even if wrong-headed, was anything more than a garden-variety mistake in corporate judgment. . . .

Rathbun v. *Autozone*, 361 F.3d 62, 74 (1st Cir. 2004) (citations and internal quotations omitted); see also *Byrnie* v. *Town of Cromwell*, 243 F.3d 93, 103 (2d Cir. 2001) ("the court must respect the employer's unfettered discretion to choose among qualified candidates . . . (and not to act as a super personnel department that second guesses employers' business judgments)") (citation omitted); *Scott* v. *University of Mississippi*, 148 F.3d 493, 509 (5th Cir. 1998) ("[d]isagreements over which applicant is more qualified are employment decisions in which we will not engage in the practice of second-guessing"); *Peters* v. *Lieuallen*, 746 F.2d 1390, 1393 (6th Cir. 1984) ("[t]he fact that a court may think that an employer misjudged the qualifications of an applicant does not in itself establish a Title VII violation."); *Millbrook v. IBP*, 280 F.3d 1169, 1181 (7th Cir. 2002) ("a court's role is to prevent unlawful hiring practices, not to act as a super personnel department that second guesses employer's business judgments."); *Bullington* v. *United Air Lines*, 186 F.3d 1301, 1318 n.14 (10th Cir. 1999) ("courts, when analyzing the pretext issue, do not sit as super-personnel departments free to second-guess the business judgment of the employer"); *Fishbach* v. *D.C. Dept. of Correc.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("the court must respect the employer's unfettered discretion to choose among qualified candidates and [remember that the court] does not sit as a super-personnel department that reexamines an entities' business decisions").

Accordingly, to prevent second-guessing of presumptively good faith business decisions, the courts of appeals have uniformly insisted that plaintiffs who seek to show pretext based solely on a comparison of qualifications must demonstrate that their own qualifications were markedly superior. The lower courts have expressed this requirement in different ways, but their expressions all serve the same purpose, and do not differ in substance: First Circuit—plaintiff's "qualifications must be "**obviously superior**," *Rathbun*, 361 F.3d at 75; Second Circuit—"plaintiff's credentials . . . [must] be **so superior** . . . that 'no reasonable person in the exercise of impartial judgment, could have chosen the candidate selected," *Byrnie*, 243 F.3d at 103; Fourth Circuit—"qualifications so **plainly superior** that the employer could not have preferred another candidate," *Dennis* v. *Columbia Collecton Med. Ctr.*, 290 F.3d 639, 648 n.4 (4th Cir. 2002); Fifth Circuit—"comparison of . . . qualifications does not reveal any **glaring distinction** that would support" a better qualified finding, *Scott*, 148 F.3d at 509; Seventh Circuit—"differences are **so favorable** to . . . plaintiff **that there can be no dispute among reasonable persons** of impartial judgment that the plaintiff was clearly better qualified," *Millbrook*, 280 F.3d at 1179; Ninth Circuit—plaintiff's qualifications must be "**clearly superior**," *Odima* v. *Westin Tucson Hotel*, 53 F.3d 1484, 1492 (9th Cir. 1995); Tenth Circuit—"the disparity in qualifications must be **overwhelming**," *Bullington* v. *United Air Lines*, 186 F.3d 1301, 1319 (10th Cir. 1999); Eleventh Circuit—"disparities in qualifications . . . of **such weight and significance that no reasonable person**, in the exercise of **impartial judgment**, could have chosen the candidate selected over the plaintiff," *Lee* v. *GTE Florida*, 226 F.3d 1249, 1254 (11th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001); D.C. Circuit—plaintiff must be "**significantly better quali-**

fied," *Aka* v. *Washington Hospital Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (emphasis supplied).[13]

2. Petitioner attempts to manufacture a conflict from variations in the foregoing verbal formulas. Completely ignoring the phrasings used by the First, Second, Fourth and Seventh Circuits, petitioner tries to group the remaining circuit pronouncements into supposedly varying standards of lesser and stricter scrutiny. She thus characterizes the District of Columbia's formulations as an "intermediate standard," Pet. at 18, that falls between the supposed poles of the Fifth, Tenth and Eleventh Circuits, on the one hand, and the Sixth and Ninth, on the other hand. Relying on stray comments in two decisions (one unpublished) and a parsing of the results in Ninth and Eleventh Circuit decisions (most of which are also unpublished), petitioner attempts to prove that these allegedly varying standards are "outcome determinative," *id.* at 16, and indeed, that the Eleventh Circuit's "slap in the face" test is "fatal in practice," *id.* at 10. This effort is wholly unavailing.

a. The centerpiece of petitioner's asserted "circuit split" is her claim that the "Ninth and Sixth Circuits have expressly rejected" the "slap in the face" standard. *Id.* at 10. But the language petitioner cites from the Sixth Circuit's decision in *Jenkins* v. *Nashville Public Radio*, 106 Fed. Appx. 991 (6th Cir. 2004), is dictum, because the court found that the evidence of superior qualifications, combined with other evidence such as irregularities in the application process, were

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[13] This uniform requirement of marked superiority in qualifications completely belies petitioner's claim, Pet. at 19, that this Court mandated use of a mere "better qualified" test in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989). *Patterson* held only that a § 1981 plaintiff is not required to prove pretext based solely on superior qualifications. *Id.* at 187-88. It did not purport to establish what degree of superiority is required when a plaintiff seeks to establish pretext in this manner. Indeed, under petitioner's misreading of *Patterson*, every one of the lower court standards—including the Ninth Circuit's "clearly superior" test which petitioner herself champions—would be invalid.

collectively sufficient to permit a jury to find pretext. *Id.* at 995. More fundamentally, *Jenkins* is unpublished, and thus does not establish the law in the Sixth Circuit at all.[14]

Similarly, the Ninth Circuit's statement that it has "*never* followed" the "slap in the face" test, *Raad* v. *Fairbanks North Star Borough School Dist.*, 323 F.3d 1185, 1194 (9th Cir. 2003) (emphasis in original), does not create a conflict. In *Raad*, the Ninth Circuit re-affirmed its use of the "clearly superior" test. *Id.* It nowhere explained how that standard differed from the "slap in the face" test, let alone explained why the plaintiff in that case—an applicant for a teaching position who had a graduate degree and received "outstanding faculty recommendations" from her state teachers program—satisfied the "clearly superior" test of *Odima* but not the "slap in the face" test.[15]

In the absence of a concrete showing that the standards differ in a way that would have dictated a different result in *Raad*—and the Ninth Circuit's isolated comment establishes no such thing—there is no basis for claiming that there is "a widespread and well recognized inter-circuit conflict." Pet. at 8. In fact, as a linguistic matter, there is no substantive difference between the two formulations. To say that plaintiff's qualifications are "clearly superior" simply means that the superiority of those qualifications is "without doubt or question." *Webster's Third New International Dictionary* (1971) at 420 (defining "clearly"). Although more colorful, the "slap in the face" test requires no more than this. In the

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[14] Sixth Circuit Internal Operating Rule 206(c) provides that only published opinions are binding.

[15] Indeed, the Ninth Circuit nowhere mentioned the qualifications of the successful applicant and thus offered no explanation of his comparative qualifications.

Fifth Circuit, where "slap in the face" originated, Judge Jolly has explained that the phrase:

> is simply a colloquial expression that we have utilized to bring some degree of understanding of the level of disparity in qualifications required to create an inference of intentional discrimination. In its essence, the phrase should be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.

Deines v. *Texas Dept. of Protective and Regulatory Servs.*, 164 F.3d 277, 280-81 (5th Cir. 1999).[16] In other words, "slap in the face" should be understood to mean that there can be no "doubt or question" about the superiority of plaintiff's qualifications—*i.e.*, that they are "clearly superior." *Raad*, 323 F.3d at 1194.

Indeed, the most telling evidence that the standards are indistinguishable is the decision in *Lee*, the case in which the Eleventh Circuit first adopted the "slap in the face" phrase. See 226 F.3d at 1254. Applying that test to the evidence before it, the Eleventh Circuit concluded that the plaintiff "did not meet her burden [under the 'slap in the face' test] of establishing" pretext because her "evidence fell far short of establishing that she was *clearly more qualified* for the position than" the candidate selected. *Id.* at 1255 (emphasis

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[16] The phrase had its origin in *Odom* v. *Frank*, 3 F.3d 839, 847 (5th Cir. 1993), where the Fifth Circuit explained that: "unless the disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty by virtue of their own years of experience and expertise. . . ." Petitioner would turn an expression of judicial humility and restraint into an intrusive rant - the use of the phrase in its judicial context is incapable of such an extreme makeover.

added). Thus, the Eleventh Circuit itself has equated "slap in the face" with "clearly more qualified," which is identical to "clearly superior."

b. Petitioner's attempt to use the results of various cases in the Sixth, Ninth and Eleventh Circuits to show that the standards are "outcome determinative" is equally misguided. Four of the six cases petitioner cites from the Ninth Circuit, and three of the five they cite from the Sixth Circuit, are unpublished. These cases thus provide no reliable evidence of how the supposedly different standards in these circuits operate. As Judge Leval of the Second Circuit explained at a recent symposium, unpublished opinions:

> are very hastily done. As a result, they are sometimes ambiguous, overstated, and misleading in their legal explanations. [Judge] Kozinski . . . likens them to sausage not fit for human consumption. The fact is that if you are producing non-citable summary orders for the purpose of saving your time for the precedentially important opinions, those [unpublished] opinions will not be good. They may contain confusing language capable of causing mischief.

The Appellate Judges Speak, 74 Fordham L. Rev. 1, 15 (2005); see *id.* at 18 (unpublished opinions "typically leave out the facts" and "a lot of balancing information and discussion that you would put in if you were trying to write a complete explanation that you expected to guide future panels") (comments of Chief Judge Boudin of the First Circuit); William M. Richman and William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 284 (1996) ("unpublished dispositions are . . . dreadful in quality" and were described by the former Chief Judge of the Federal Circuit as "'junk' opinions"). Justice Breyer has noted that many unpublished opinions are not even written by judges. Stephen Breyer, *Administering Justice in the First Circuit*, 24 Suffolk

U. L. Rev. 23, 32-33 (1990). In the Ninth Circuit, "in many cases the judges will not have read any briefs, nor even read the opinion that is going out under the Ninth Circuit's name." *The Appellate Judges Speak*, 74 Fordham L. Rev. at 19 (summarizing letters from Ninth Circuit judges concerning that court's practice).

Nor do the few published decisions petitioner cites demonstrate that the Ninth and Sixth Circuits "accept evidence of far less extreme differences in qualifications as sufficient." Pet. at 8-9. In *Zambetti* v. *Cuyahoga Community College*, 314 F.3d 249 (6th Cir. 2002), the Sixth Circuit held that a Selection Advisory Committee's judgment that plaintiff was "*substantially* more qualified" was sufficient, *when "coupled with" other evidence*, to survive summary judgment. *Id.* at 260 (emphases added). And *Glenn's Trucking Co.* v. *N.L.R.B.*, 298 F.3d 502 (6th Cir. 2002), did not even involve Title VII at all, but rather an unfair labor practice charge under the National Labor Relations Act that only required proof that union applicants were "qualified" for the jobs they sought. *Id.* at 506.

The two published Ninth Circuit decisions petitioner cites are equally beside the point. Neither *Godwin* v. *Hunt Wesson, Inc.*, 150 F.3d 1217 (9th Cir. 1998), nor *Lindahl* v. *Air France*, 930 F.2d 1434 (9th Cir. 1991), involved claims that a plaintiff's allegedly superior qualifications were alone sufficient to sustain a finding of pretext. Rather, in both cases, the court simply noted that evidence that the person chosen for a position "may not have been the best candidate"—not that the plaintiff was the superior candidate—can create a triable issue of pretext. *Godwin*, 150 F.3d at 1222; *Lindahl*, 930 F.3d at 1439. Accordingly, the Ninth Circuit did not even mention the "clearly superior" test in these cases, let alone apply it in a manner that demonstrates that it is substantively different from the "slap in the face" test.

Petitioner's attempt to show that the "slap in the face" test is a form of "strict" scrutiny that is "fatal in practice," Pet. at 10, is similarly misleading. This claim ignores the realities of the court system and presupposes that published opinions represent the entire universe of cases that have involved the issue at hand. Obviously, in those cases where a court has concluded that sufficient qualifications evidence was presented by the plaintiff to survive a summary judgment or a motion for judgment as a matter of law, the result would be the issuance of a non-appealable order. Undoubtedly, there are numerous cases in which courts have found the plaintiff's qualifications evidence to be sufficient but there is no published opinion reflecting that holding because the cases have settled, were tried to verdict without appeal or were otherwise resolved without an appeal or published decision.

3. Even if there was a conflict in the circuits over the evidentiary standard for proving pretext based solely on a plaintiff's superior qualifications—and there manifestly is not—this case would not be the proper vehicle for resolving such a conflict. Petitioner's claim below, and before this Court, is *not* that she was more qualified under the criteria that the decision-maker actually used. Petitioner asserted to the District Court, the Eleventh Circuit, and this Court, that she was the most qualified individual for the position based solely on her seniority and human resources experience. Pet. Appx. 104a; Pet. at 7. However, this argument ignores the actual criteria used by the original decision maker, Pittard: education, HR Manager experience, total human resources experience, references, community involvement, willingness to relocate, motivation and drive, presence, and relationship with the union.

This disagreement over which decisional criteria were or should have been used to measure the qualifications of the respective job applicants precludes consideration of the first question petitioner seeks to raise. If Pittard in fact applied the

criteria he said he applied, then petitioner was not better qualified, let alone markedly so, and the question of superior qualifications is not presented at all.

Moreover, an independent committee reviewed the promotion decision at issue in this matter and reached the same conclusion, and there is no evidence that the committee's decision was tainted by age or race discrimination. The District Court determined that, even assuming that the decision reached by Pittard regarding the Oxford promotion was tainted by either age or race discrimination,[17] Tyson "named a committee independent of the initial decision maker which reached the same decision" and "there is absolutely no evidence that the later decision was so tainted." Pet. Appx. 104a. *Three of the four panelists determined that Burdick was the most qualified candidate for the position.* Even if petitioner's alleged evidence regarding qualifications establishes pretext in Pittard's decision to promote Burdick (which it does not), it does not negate the finding of the independent review committee. As such, this case is not an appropriate vehicle for addressing any conflict regarding "comparative qualifications" claims.

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[17] The District Court expressly found no such evidence as to the first decision. Pet. Appx. 104a n. 123.

CONCLUSION

For the foregoing reasons, respondent requests that this Court deny the Petition.

Respectfully submitted,

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